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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

DIVISION PRO TEM B

HON. WARREN R. DARROW

By: Diane Troxell, Judicial Assistant

CASE NUMBER: V1300CR201080049

Date: December 1, 2010

TITLE:	COUNSEL:
STATE OF ARIZONA	Sheila Sullivan Polk Yavapai County Attorney Bill Hughes, Esq. Steven Sisneros, Esq. Deputy Yavapai County Attorneys
(Plaintiff)	(For Plaintiff)
vs.	
JAMES ARTHUR RAY	Thomas K. Kelly, Esq. 425 E. Gurley Prescott, AZ 86301 Luis Li, Esq. Brad Brian, Esq. Truc Do, Attorney at Law Miriam L. Seifter Attorney at Law MUNGER TOLLES & OLSON LLP 355 S. Grand Avenue, 35th Fl. Los Angeles, CA 90071
(Defendant)	(For Defendant)

UNDER ADVISEMENT RULING ON MOTION FOR PROTECTIVE ORDER RE: STATE'S NOTES FROM INTERVIEWS

The Court has considered the motion, response, reply, the State's supplement, and the arguments of counsel. After discussion of this issue with counsel at the oral argument that was concluded on November 16, 2010, it appears the parties have resolved – at least for now – the issue involving the State's request for a protective order. The Court indicated that it would not order disclosure of attorney notes and that this written order would follow. As the Court suggested at oral argument on November 1, 2010, the motion presents a difficult issue, an issue involving legitimate, competing interests. Although at first glance Arizona case authority seems clear, this Court is unaware of any Arizona authority directly on point.

The circumstances that gave rise to this disclosure dispute have changed significantly. The request for statements of Mr. Rick Ross came at a time when the defense was faced with the prospect of having to prepare for his testimony at a hearing scheduled just a few weeks away. This late notice was, understandably, of concern to the Defendant's attorneys. The defense needed to know the substance of Mr. Ross's anticipated testimony for a number of reasons, including preparation for the Rule 404(b) hearing, consideration of the need to consult a defense expert, and consideration of the possibility of posing a challenge to the expert testimony in a pretrial hearing in accordance with *Logerquist v. McVey*, 196 Ariz. 470, 37 P.3d 113 (2000), *Frye v. United States*, 293 F. 1013 (D.C.Cir. 1923), or recently enacted A.R.S. § 12-2203, which essentially codifies the procedure set forth in *Daubert v. Merrell Dow Pharm. Inc.* , 509 U.S. 579 (1993) and is consistent with Federal Rule of Evidence 702. The State withdrew Mr. Ross as a witness for the Rule 404(b) hearing and thus alleviated, to some degree, the factor of time pressure.

In *State v. Roque*, 213 Ariz. 193, 141 P.3d 268 (2006), the Arizona Supreme Court recognized, albeit indirectly, a distinction between disclosure requirements for non-expert and expert witnesses. "Arizona Rule of Criminal Procedure 15.1(a)(3) [(now 15.1(b)(4))] addresses the scope of disclosure of expert testimony in criminal cases." *Id.*, 213 Ariz. at 206, 141 P.3d at 381.

> Few Arizona cases have touched on the scope of disclosure required under Rule 15.1(a)(3). By contrast, a number of cases have addressed the scope of disclosure required under other rules. *See e.g. State v. Williams*, 183 Ariz. 368, 379, 904 P.2d 437, 448 (1995) ("Rule 15.1(a)(1) requires the state to disclose the names and addresses of all ***[non-expert] witnesses*** together with their relevant written or recorded statements," but does "not require the state to explain how it 'intends' to use each of its witnesses.")

Id., 213 Ariz. at 207, 141 P.3d at 382 (bracketed language and citation in original; emphasis added).

Thus, as the parties apparently now agree, the language of the rules and the case law do not require the prosecutor – and for that matter, the defendant – to disclose all written or recorded statements of expert witnesses. However, as the State has recognized, the prosecutor must disclose the results of physical examinations and of scientific tests, experiments, or comparisons that have been completed, regardless of whether or not these results have been expressed in some form of written or recorded report or other statement. As stated by the Arizona Supreme Court in *Roque*,

> [W]e hold that Rule 15.1(a)(3) applies even if an expert has not written down the "results of physical examinations and of scientific tests, experiments or comparisons," as long as such results are known to the state. Such a reading of Rule 15.1(a)(3) serves to avoid surprise and delay at trial . . . and to allow a party time to check the conclusions of the opposing party's expert and call an expert in rebuttal, if necessary . . . .

Id., 213 Ariz. at 208-209, 141 P.3d at 383-84 (citations omitted). Furthermore, unlike the corresponding rule – Rule 15.2(c)(2) – relating to the Defendant's duty to disclose material and information relating to experts, the State's obligation under Rule 15.1(b)(4) applies to all experts, regardless of whether or not the State intends to call the expert at trial, and

arises once the expert has examined the defendant or considered any evidence in the particular case.

This Court concludes that Rules 15.1(b)(1) and (b)(4) and Rules 15.2(c)(1) and (c)(2) do not require the State and the Defendant to provide disclosure of statements – in the form of attorney notes or otherwise – of expert witnesses retained by the parties. Rather, the parties are required to disclose "results" of examinations, tests, experiments or comparisons made by the expert. In some cases this information may be contained in attorney notes or other statements by the expert, and in those cases a party may choose to disclose the required information by providing notes and statements.

For the reasons discussed above,

IT IS ORDERED THAT the attorney and attorney-staff notes of meetings with expert witnesses retained by the parties are not subject to disclosure under Rules 15.1(b)(1) and (b)(4) and Rules15.2(c)(1) and (c)(2).

IT IS FURTHER ORDERED DENYING the Defendant's specific request made at oral argument on November 1, 2010, for preservation of the record under Rule 15.5 (d), but DIRECTING both parties to preserve until further order of the Court all notes of the type which is the subject of the motion for protective order.

DATED this 1ST day of December, 2010.

Warren R. Darrow

Warren R. Darrow
Superior Court Judge

cc: Victim Services Division